

***United States Court of Appeals
for the Second Circuit***



APPENDIX

NO. 77-4021

United States Court of Appeals

FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

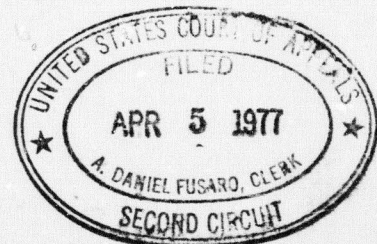
**ASSOCIATED MUSICIANS OF GREATER
NEW YORK, LOCAL 802, AMERICAN
FEDERATION OF MUSICIANS, AFL-CIO**

Respondent.

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER
OF THE NATIONAL LABOR RELATIONS BOARD**

APPENDIX

ELLIOTT MOORE,
*Deputy Associate General Counsel,
National Labor Relations Board.*
Washington, D. C. 20570.



PAGINATION AS IN ORIGINAL COPY

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Administrative Law Judge's Decision, Dated January 7, 1976.....	2
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

In the Matter of: Associated Musicians of Greater
New York, Local 802, American
Federation of Musicians, AFL-CIO

Case Nos: 29-CE-25, 29-CC-433 and
29-CE-30

8. 6.74	Charge filed in 29-CE-25
10.16.74	Charge filed in 29-CC-433
4.28.75	Charge filed in 29-CE-30
5.30.75	Regional Director's Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, dated
6. 6.75	Answer of Associated Musicians of Greater New York, Local 802, A.F.M., AFL-CIO, received
7.17.75	Respondent's Request for Postponement, datex
6.19.75	Regional Director's Order Rescheduling Hearing, dated
7. 7.75	Respondent's Request for Postponement, dated
7.10.75	Regional Director's Order Rescheduling Hearing, dated
7.14.75	Regional Director's Order, dated
7.21.75	Hearing Opened
7.22.75	Hearing Closed
1. 7.76	Administrative Law Judge's Decision issued
2.11.76	Respondent's Exceptions of the Administrative Law Judge's Decision, received
2.13.76	Charging Parties' Exceptions to the Limited Remedy Recommended by the Administrative Law Judge, dated January 7, 1976 in the following respects to Wit, received
6.30.76	Decision and Order of the National Labor Relations Board, dated

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

ASSOCIATED MUSICIANS OF GREATER NEW YORK,
LOCAL 802, AMERICAN FEDERATION OF MUSICIANS,
AFL-CIO (HUNTINGTON TOWN HOUSE, INC.)

and

Case No. 29-CE-25

NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

ASSOCIATED MUSICIANS OF GREATER NEW YORK,
LOCAL 802, AMERICAN FEDERATION OF MUSICIANS,
AFL-CIO (BOB CHEVY ORCHESTRAS)

and

Case No. 29-CC-433

NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

ASSOCIATED MUSICIANS OF GREATER NEW YORK,
LOCAL 802, AMERICAN FEDERATION OF MUSICIANS,
AFL-CIO (VOGUE RESTAURANT, INC.)

and

Case No. 29-CE-30

NATIONAL ASSOCIATION OF ORCHESTRA LEADERS

Stephen E. Appel, Esq., of Brooklyn, N.Y.,
for the General Counsel.

Jeffrey L. Kreisberg, Esq. (Levin & Weissman),
of New York, N.Y., for the Respondent.

Godfrey P. Schmidt, Esq., and Mr. Charles Peterson
of New York, N.Y., for the Charging Party.

DECISION

Statement of the Case

ROBERT M. SCHWARZBART, Administrative Law Judge: These consolidated cases were heard at Brooklyn, New York, on July 21 and 22, 1975, pursuant to charges filed by the National Association of Orchestra Leaders, 1/ herein called

1/ The charges in Cases Nos. 29-CE-25, 29-CC-433 and 29-CE-30 were filed on August 6 and October 16, 1974, and on April 28, 1975, respectively

the Charging Party. The complaint, as issued on May 30, 1975, alleges that the Respondent, Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO, herein called the Respondent Union, with the Huntington Town House, Inc., 2/ herein called Huntington, and Vogue Restaurant, Inc., 3/ herein called Vogue, respectively, maintained and enforced illegal "hot cargo" agreements, arrangements or understandings in violation of Section 8(e) of the National Labor Relations Act, as amended, under which only members of the Respondent Union were permitted to provide musical services to patrons of Huntington and Vogue. The consolidated complaint further alleges that the Respondent Union also violated Section 8(b)(4)(ii)(B) of the Act 4/ by threatening, coercing and restraining the Queens Center Merchants Association, Inc., a neutral employer, to force and require that Association to cease doing business with Bob Chevy Orchestras, with whom the Respondent Union had a labor dispute. 5/

All parties appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, argue orally and to file briefs. 6/ Upon the entire record of the case, 7/ and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. The Business of the Employers Involved

Huntington, a New York corporation, has its principal office and place of business in the Village of Huntington Station, where it is, and has been at all times material herein, engaged in providing catering facilities for public and private social affairs, including food, beverage and related services. During the past year, which period is representative of its annual operations generally, Huntington, in the course and conduct of its operations, derived gross revenues therefrom in excess of \$500,000,

2/ In case No. 29-CE-25.

3/ In Case No. 29-CE-30.

4/ In Case No. 29-CC-433.

5/ Chevy is not a member in good standing of the Respondent Union.

6/ The General Counsel and Respondent argued orally. Briefs were received from the Respondent and Charging Party.

7/ In addition to the Respondent Union, the consolidated complaint also named Huntington and Vogue as parties respondent in Cases Nos. 29-CE-25 and 29-CE-30, respectively. Prior to the opening of the hearing, the Regional Director recommended that the Board approve a formal settlement stipulation, entered into by and between Huntington and Vogue and the Charging Party, which provided, inter alia, that Huntington and Vogue would cease entering into, maintaining, enforcing or giving effect to their respective alleged agreements, arrangements or understandings with the Respondent Union, whereunder only members of the Respondent Union are permitted to conduct orchestras or bands or to provide musical services to patrons of Huntington or Vogue. The Settlement Stipulation which also provided for the entry of a consent order by the Board and a consent judgment by (Continued)

and caused to be transported and delivered to its Huntington Station facility, foodstuffs, beverages, and other goods and materials valued in excess of \$50,000 of which goods and materials valued in excess of \$50,000 were transported and delivered to its place of business in interstate commerce directly from states of the United States other than the state in which it is located.

Queens Center Merchants Association, Inc., herein called the Association, is a nonprofit New York corporation with its principal office and place of business at 90-15 Queens Boulevard, Rego Park, New York, in the Queens Center Mall, herein called the Mall, where it is, and has been at all times material, engaged in promoting the businesses of its members located at the Mall, which members include Abraham & Straus, Division of Federated Department Stores, Inc., herein called A & S; Ohrbach's; and Herman's World of Sporting Goods, herein called Herman's, which are located at 90-01, 90-51, and 90-15 Queens Boulevard, respectively, in the Mall.

At all times material herein, A & S has maintained a place of business in the Mall at 90-01 Queens Boulevard, Rego Park, Queens, New York, and other places of business in the State of New York, where it is engaged in the retail sale of clothing, household appliances, cosmetics, jewelry, and related products. During the past year, which period is generally representative of its annual operations, A & S, in the course and conduct of its business operations, derived gross revenues therefrom in excess of \$500,000 and purchased and caused to be transported to its New York places of business, clothing and other goods and materials valued in excess of \$50,000 of which goods and materials valued in excess of \$50,000 were transported and delivered to its places of business in interstate commerce directly from states of the United States other than the state in which it is located.

At all times material herein, Ohrbach's has maintained a place of business in the Mall at 90-51 Queens Boulevard, Rego Park, Queens, New York, and other places of business in the State of New York, where it is engaged in the retail sale of clothing and related products. During the past year, which period is representative of its annual operations generally, Ohrbach's in the course and conduct of its business operations, derived gross revenues therefrom in excess of \$500,000 and purchased and caused to be transported to its New York places of business, clothing and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its places of business in interstate commerce directly from states of the United States other than the state in which it is located.

At all times material herein, Herman's has maintained a place of business in the Mall, at 90-15 Queens Boulevard, Rego Park, Queens, New York,

7/ (Continued) any appropriate United States Court of Appeals, and pursuant to which the parties waived all further proceedings, was approved by the Board on October 9, 1975, (DS-767). In accordance with the General Counsel's motion, the caption of this proceeding has been amended to remove Huntington and Vogue as parties respondent.

and other places of business in the State of New York, where it is engaged in the retail sale of sporting goods and related products. During the past year, which period is generally representative of its annual operations, Herman's, in the course and conduct of its business operations, derived
5 gross revenues therefrom in excess of \$500,000, and purchased and caused to be transported to its New York places of business, sporting goods and other goods and materials valued in excess of \$50,000, of which goods and materials valued in excess of \$50,000 were transported and delivered to its places of
10 business in interstate commerce directly from states of the United States other than the state in which it is located.

Robert Ciavolino, known professionally as, and herein called, Bob Chevy, is and has been at all times material herein, an individual proprietor doing business under the name and trade style of the Bob Chevy
15 Orchestras. At all times material herein, Chevy has maintained his principal office and place of business in Brooklyn, New York, where he is, and has been at all times material herein, engaged in providing musical entertainment and related services.

20 Vogue, a New York corporation, has maintained its principal office and place of business at the Skyway Hotel, 132-10 South Conduit Avenue, South Ozone Park, Queens, New York, where it is, and has been at all times material herein, engaged in the operation of a restaurant and lounge,
25 providing food, beverages and entertainment for the general public.

Gateway Hotel Associates, d/b/a Skyway Hotel, herein called Skyway, is a partnership with a place of business at the Skyway Hotel, 132-10 South Conduit Avenue, South Ozone Park, Queens, New York, where
30 it is, and has been at all times material herein, engaged in the operation of a hotel for the general public.

Vogue and Skyway conduct their operations in such a manner as to supplement each other and convey to the public the impression that they
35 are both integral parts of a single enterprise.

During the past year, which period is generally representative of their annual operations, Vogue and Skyway, in the course and conduct of their restaurant and hotel operations, derived combined gross revenues therefrom in excess of \$500,000, and Vogue purchased and caused to be
40 transported and delivered to its restaurant, liquor, food, and other goods and materials valued in excess of \$50,000 of which goods and materials valued in excess of \$50,000 were transported and delivered to it, and received from other enterprises located in the State of New York, each of which other
45 enterprises had received the said goods and materials in interstate commerce directly from states of the United States other than the state in which it is located.

Vogue and Skyway, and each of them, are and have been at all times material herein, employers engaged in commerce within the meaning of
50 Section 2(2), (6) and (7) of the Act.

Huntington is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Association, A & S, Ohrbach's, Herman's, and each of them, are and have been at all times material herein, persons engaged in commerce and in industries affecting commerce within the meaning of Sections 2(1), (6) and (7) and 8(b)(4) of the Act.

Bob Chevy is, and has been at all times material herein, a person within the meaning of Sections 2(1) and 8(b)(4) of the Act. 8/

II. The Labor Organization Involved

The Respondent Union is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

8/ Although the consolidated complaint did not set forth jurisdictional allegations as to whether Del Castile, an orchestra leader, and Jeff and Phil, a musical duo, are persons within the meaning of Section 2(1) and 8(b)(4) of the Act, a determination of the same is necessary as the General Counsel contends that the unwritten "hot cargo" agreements allegedly in effect between the Respondent Union and Huntington and Vogue, respectively, were enforced against these parties. From the nature of the Section 8(e) violations alleged, it is necessary that a determination be made as to whether Castile and/or Jeff and Phil were self-employed persons or were respectively employees of Huntington and Vogue within the meaning of Section 2(3) of the Act, as Section 8(e) proscribes only accords whereby an employer agrees to cease doing business with "any other person," as distinguished from that employer's own employees. However, the record of this proceeding revealed that both Castile and Jeff and Phil, who will be described in greater detail, infra, are the proprietors of their respective enterprises and garner income from selling musical services to purchasers for a price. Accordingly, I find that they are self-employed persons within the scope of Sections 2(1) and 8(b)(4) of the Act. Associated Musicians of Greater New York, Local 802, A.F.M., AFL-CIO (National Association of Orchestra Leaders), 176 NLRB 198, 199. In reaching this conclusion in the absence of a supporting allegation in the complaint, it is noted that the Respondent Union, pursuant to a stated intent to proceed to a determination herein on the merits, amended its answer at the hearing to admit the jurisdictional allegations contained in the complaint. The Respondent Union also did not seek to challenge the applicability of the alleged Section 8(e) violations as they might relate to Castile or Jeff and Phil or of other relevant parties, on jurisdictional grounds. As the above indicated omissions constitute inadvertent error corrected by the record, and have not prejudiced the stated positions of the Respondent, they are hereby corrected.

III. The Alleged Unfair Labor Practices

A. Background

5 The American Federation of Musicians, AFL-CIO, herein called
A.F.M., the parent organization of the Respondent Union herein and its
various affiliated local unions, have engaged in extensive litigation
before the Courts and the Board with the Charging Party on a series
of matters arising around the country. 9/

10

Local 802, A.F.M., the Respondent herein, has also been party
to a series of legal actions involving the Charging Party herein. 10/
The decision cited by the General Counsel as most relevant to the instant
matter is Associated Musicians of Greater New York, Local 802, American
15 Federation of Musicians, AFL-CIO, (Huntington Town House, Inc., 11/
issued on June 1, 1973, where it was found that the Respondent Union had
violated Section 8(e) of the Act in that with Huntington 12/ it had
maintained and enforced a clause in Huntington's contracts 13/ with
patrons that only Local 802 musicians "shall be employed on Huntington's
20 premises." It was also found that Local 802 had violated
Sections 8(b)(4)(ii)(A) and (B) of the Act, when, in the presence of
management representatives of Huntington, a business representative of the
Respondent Union threatened to "pull every musician out of the the
[Huntington] building" and also call out the unionized waiters unless
25 he were allowed to enter the room where a private affair was in progress
in order to check on the Union standing of the musicians who were playing
for a nonunion leader. The business representative also threatened to
take similar future action if the nonunion bandleader were to continue
to play on the next day. It was found that the foregoing and like conduct
30 was violative of Section 8(b)(4)(ii)(A) of the Act in that an object of
the threats was to compel Huntington to maintain its agreement to employ
only members of Local 802 on its premises. The determination that an

35 9/ Charles Peterson, treasurer of the Charging Party, testified at the
hearing that it is a function of his organization to aid conductors
or band leaders who feel that their rights may have been adversely
affected by actions taken by the A.F.M. in various parts of the
country. Such individuals would be assisted in the filing of charges
40 with the National Labor Relations Board and with the institution of
court litigation. Peterson stated that during the 2 years prior to the
instant hearing, he filed approximately 50 charges with the Board
against the A.F.M.

10/ See, inter alia, Associated Musicians of Greater New York, Local 802,
45 A.F.M. (Dante Caterers, Inc.), 212 NLRB No. 79; Associated Musicians of
Greater New York, Local 802, A.F.M., AFL-CIO (National Association of
Orchestra Leaders), 176 NLRB 198; Associated Musicians of Greater
New York, Local 802, A.F.M., AFL-CIO (Random Travel, Inc., et al.),
171 NLRB 1106.

50 11/ 203 NLRB 1078.

12/ As in the present case, Huntington signed a settlement agreement that was
approved prior to the opening of the hearing therein.

13/ That decision noted that the disputed clause had appeared in Huntington's
contracts with its patrons for at least 12 years.

object of the same conduct was to compel Huntington and other persons (including the patrons of the nonunion bandleader in question) to cease doing business with the said nonunion bandleader, resulted in a finding that Section 8(b)(4)(ii)(B) of the Act also had been violated.

B. The Alleged Violations of
Section 8(e) of the Act

1. The Events at the Huntington
Town House

Huntington, which maintains 11 ballrooms for the catering of weddings, bar mitzvahs, business meetings and other events, contracts with patrons for their use. Typically, Huntington will provides patrons with banquets served by its own staff of bartenders, dining room and kitchen personnel. However, Huntington does not employ musicians or have a collective bargaining agreement with the Respondent Union. Those patrons who wish to have music played at their events must contract independently for musical services. Each ballroom contains a bandstand, piano and facilities suitable for use by a musical group.

From the events to be described below, the General Counsel and Charging Party contend that the Respondent Union and Huntington entered into and enforced an unwritten "hot cargo" agreement, arrangement or understanding in violation of Section 8(e) of the Act. Under the alleged agreement, only conductors, bandleaders and musicians who are members of the Respondent Union may be employed on Huntington's premises, thereby compelling patrons to cease or refrain from doing business with musicians who were not members of Local 802. 14/

The General Counsel also argued inferentially that the alleged "hot cargo" agreements could be more readily implied as such conduct would be consistent with the Respondent Union's bylaws. 15/

14/ The "hot cargo" agreement alleged in the instant case, if found to exist, would differ from the agreement found unlawful in the prior case involving the Respondent Union and Huntington, cited at 203 NLRB 1078, only in that in the earlier case, the contract between Huntington and its patrons contained a written clause reading: "Only union musicians of A.F.M., shall be employed on these premises Local 802." In the instant case, the alleged agreements are unwritten. 15/ The General Counsel marked the following bylaws of the Respondent Union as relevant:

ARTICLE IV.

Duties of Members and Penalties

SECTION 1. It shall be a violation and detrimental to the welfare of this Local for a member to commit any one or more of the following acts, all of which are hereby prohibited, viz: (Continued)

* * * * *

The Respondent Union, while not disputing that such agreements would be violative of the Act, if extant, denied their existence at Huntington and Vogue and introduced evidence to show that nonunion musicians regularly performed on the premises of those employers during the times relevant herein. In addition, the Respondent Union contends that Huntington, in particular, did not favor the Respondent Union over a rival union by limiting access to its premises only to the Respondent Union's representatives.

Del Castile 16/ testified that in accordance with a contract he had entered into on October 16, 1973, he appeared at Huntington's Brentwood Room at about 8 p.m. on July 28, 1974, with a group of musicians, 17/ to

15/ (Continued) (F) To render services or contract to render services in any place or for any employer declared unfair by the Executive Board of this Local or the President or International Executive Board of the American Federation of Musicians;

* * * * *

(H) To perform in or with a band or orchestra which is led or conducted by a non-member of the Union or in which a non-member plays an instrument or performs any other work of a musician.

* * * * *

(M) To engage or assist in engaging, or to advise or permit any one else to engage or assist in engaging, any musician who is not a member of this Local for any engagement, whether within or without our jurisdiction.

* * * * *

(W) To accept an engagement for or from any agency, person, or place that is unfair to this Local or any agent not duly authorized by the American Federation of Musicians.

* * * * *

SECTION 3. Each Leader (Personnel Manager) or member in charge shall be responsible for the good standing of each and every member working on an engagement with him, and shall request every musician on the engagement to produce his membership card.

16/ Del Castile is the professional name of William P. Dell'Aquila, a member of the Charging Party, who is generally a sideman or orchestra member, but who also performs as a leader. He was one of the persons adversely affected by the Respondent Union's conduct in the earlier case involving Huntington, cited, supra. Castile testified that he is also the administrator of the Allied Musicians' Union herein called A.M.U., an independent group rivalling the Respondent, which operates out of Castile's own office. Prior to January, 1975, Castile had been an officer of the American Musician's Union, apparently a predecessor organization to the Allied Musicians' Union, although the two groups had different executive boards. The American Musicians' Union was no longer active at the time of the hearing.

17/ Included in Castile's orchestra on the evening in question were Melvin Finkelstein, professionally known as Mel Fields, Christopher Orlando, Tony DiPaolo and Martin Reisman. Finkelstein, too, had been among those adversely affected by the Respondent Union's conduct in the (Continued)

provide the musical services at a wedding reception.

That evening at about 9:20, Joseph Messina, a business representative of the Respondent Union, 18/ entered the room. According to Castile, while the band was playing a rock number, Messina approached, inserted himself between the band and the guests at the affair and shouted an inquiry across the bandstand to Finkelstein 19/ as to whether a contract had been filed. 20/ Finkelstein replied that Messina was disturbing the band's performance and asked him to leave. As Messina did so, he stated that he would be back.

At about 10:20 p.m., while the band was on break, Messina approached Finkelstein who was standing with Castile and Orlando and offered his business card, which Castile took. Castile told Messina that they were not members of his union and had no reason to file a contract. When Messina replied that Castile had no right to be playing in that establishment, Castile asked whether the Respondent and Huntington had an agreement whereby only Local 802 musicians could perform there. Messina answered, "Yes, they did have such an agreement." Castile said, "Well, we're here now. What are you going to do about it?" Messina responded that he was going to let them go that time, but if they ever wanted to play there again, they would have to be members of Local 802. That was the law; in 30 days, they must join the Union or they could not play there again. In response to Castile's query as to what would happen if they should return without union membership, Messina answered that there would be "trouble." Castile asked again whether all this was happening because Local 802 and Huntington had an agreement that only union musicians could play for any private function that might take place there. Messina repeated that they had such an agreement. Castile, then turned to his musicians and told them that, apparently, if they wanted to avoid trouble in the future, they would have to join this union. Castile, with his musicians nodding approvingly, told Messina that they would do that the first thing next week. Messina agreed that that was what they would have to do, and departed.

17/ (Continued) above-cited case involving Huntington. DiPaolo was identified in the record herein as the president of A.M.U. Finkelstein and Orlando gave testimony at the hearing as to the July 28 incident at Huntington that was supportive of Castile.

18/ In accordance with the stipulation of the parties at the hearing, I find that at all times material herein, Messina was an agent of the Respondent Union within the meaning of Section 2(13) of the Act.

19/ As Finkelstein was wearing a tuxedo of a different color than the others, it is contended that Messina thought that Finkelstein was the leader.

20/ The record revealed that in order to protect the pension and welfare rights of its members, the Respondent Union requires that notices of contract engagements (contracts) must be filed with it by the leader employing Local 802 musicians on forms provided by the Respondent Union. By this means, the Respondent Union is informed of the names and card numbers of the musicians employed to enable the Respondent to ensure that the proper pension and welfare payments are made on their behalf by the leaders. Compliance with this requirement is enforced by the Respondent Union's business representatives as they visit the various jobs.

Castile then asked to speak to Huntington's manager. In response to this request, Anthony Ciafardini, banquet manager, 21/ subsequently appeared. In the presence of Finkelstein and Orlando, Castile described the incident with Messina as set forth above and asked if, in fact, it was correct that only Local 802 musicians could play at Huntington. Ciafardini replied that that was correct, Huntington was a "union house." Castile, who apparently had gained experience with this type of questioning from the earlier case, again asked if he correctly understood that Huntington and Local 802 have an agreement that only Local 802 musicians may play there for private functions. Ciafardini repeated that there was such an agreement and asked if the delegate had given the band permission to finish the job. Castile answered that as they obviously were still there, he assumed that they had permission to finish the job. He then asked Ciafardini whether in the event that he and his musicians should return to perform there without Local 802 membership, would Huntington or the Union give them trouble. Ciafardini answered that they had better straighten that out with Local 802. Ciafardini once more affirmatively answered Castile's question about the existence of an agreement. Castile thanked him for his time and, with his musicians, returned to finish the engagement. From that evening to the time of the hearing, approximately 1 year later, Castile and his band have not returned to perform again at Huntington.

Messina, called as a witness by the Respondent, testified that he has been a business representative of Local 802 since August or September, 1973, and that his duties include visits to different clubs and catering houses to learn whether the engagement contracts have been filed with the Respondent so that the musicians would be covered by their pension and welfare fund. 22/

Messina and Neil Klein, 23/ a Local 802 bandleader who testified as an eyewitness, denied the account of the July 28 incident as related

21/ In accordance with the stipulation of the parties at the hearing, I find that Ciafardini, one of six managers in the banquet department, is a supervisor and agent of Huntington within the meaning of Section 2(11) of the Act. Ciafardini testified that, on occasion, he serves as the manager of the entire Huntington facility.

22/ Messina testified that during the past year, he visited Huntington's premises on an average of five times each weekend--on Fridays and twice on Saturdays and Sundays, respectively.

23/ Klein, whose band was performing that night in another of Huntington's ballrooms, testified that earlier that evening he had been compelled to ask Castile to stop disturbing Klein's organ player, then providing music for the cocktail hour, by talking to him about the A.M.U., an incident thereafter related to Messina. Klein then accompanied Messina to the Brentwood Room, where Castile in his group were appearing. Klein testified that while there, he had witnessed Messina's conversation with the Castile group from a distance of about 25 feet.

by Castile, Finkelstein and Orlando. Messina asserted that on the evening in question, in accordance with his practice, he had approached the bandstand at a time when the band was not playing and asked if a contract had been filed. When he was told that it was a Del Castile Orchestra and nonunion, he replied, "Fine. Have a nice night, gentlemen." As he was leaving one of the musicians told him "You never give up do you," or words to that effect. Messina replied that he was just doing his job, and left. According to Messina and Klein, the foregoing constituted all that was said.

Ciafardini, in his testimony, recalled that on about July 28, 1974, he had been summoned to speak to some musicians, but denied knowing or recognizing Castile, asserting an inability to recognize Castile, although the latter was indicated to him in the courtroom during the hearing. The musicians had told him that a man had just come into the room and talked to them about a union. He did not recall what was said. Ciafardini related that he had asked the musicians if he was stopping them from playing. When they said "no," he told them to play. Ciafardini recalled stating at the time that he had not hired them; their hosts had hired them and that they should do what their hosts want them to do. If the hosts wanted them to play, they should play.

Ciafardini testified at first that he did not know the Respondent Union. However, Ciafardini, thereafter, inconsistently stated that he did not know whether he had seen any delegates of the Respondent Union at Huntington prior to July 28, 1974, but that after that date, he would see such delegates once a week or twice a month on Huntington's premises. Messina was the only Local 802 representative that Ciafardini knew and contended that he had learned Messina's last name only at the hearing. 24/

Union representative Messina denied the existence of an agreement between the Respondent Union and Huntington whereby only members of the Respondent Union could perform at Huntington 25/ and testified that

24/ Ciafardini testified that patrons who asked where they might hire musicians to play at their events were advised of the existence of a referral office operated by an independent concern on Huntington's premises. Ciafardini disavowed having knowledge as to whether that office only referred patrons to musicians who are members of the Respondent Union or as to how the various bands he had seen playing at Huntington were engaged.

25/ Messina also denied knowing who Del Castile was or that Castile had been present at Huntington on July 28, 1974, explaining that under industry practice, if Castile had arranged for the engagement, a subleader could have appeared in his stead to conduct a Del Castile Orchestra. Messina persisted in his testimony that he did not know Castile or that the latter had been present even after the General General, during cross-examination, showed him a document that he earlier, during the preliminary investigation by the Board's Regional Office, had read and corrected in his own handwriting, but had not signed. (Continued)

during his visits to Huntington, he had frequently observed nonunion bands playing there--an average of two per visit. 26/

Messina also stated that his duties did not require him to engage in on the scene discussions with nonunion musicians of the type alleged. If Messina were to find a relevant infraction, his function merely would be to report the same to his supervisor at the Respondent Union's office. It would then be the Respondent Union's responsibility to take any subsequent action. 27/

Messina's testimony that nonunion leaders and musicians frequently performed on Huntington's premises during the relevant times was supported by Neil Klein, Jerry Rainbow and Richard Leiter, long-time members of the Respondent Union, who respectively testified that during their recurring engagements at Huntington, they frequently saw bands at work that they knew to be nonunion. Several of these musical groups were named in the record. In addition, in support of the Respondent Union's position that its representatives were not the only union agents to have access to Huntington's premises, Leiter, Rainbow and Klein detailed organizational efforts made by Castile and others among musicians on behalf of the A.M.U. on Huntington's premises, 28/ banquet manager Ciafardini and Leiter testified, however, that for the most part, the Respondent Union's delegates have free access to Huntington's ballrooms. 29/

25/ (Continued) In this document, Messina, inconsistent with his testimony at the hearing that he had never seen Castile, related, that when he had approached the bandstand and asked if they had filed a contract with the Union for that engagement, one of the musicians replied that he was Del Castile.

26/ In support of this testimony, copies of certain of Messina's engagement reports during the relevant period were introduced into evidence. Engagement reports are small slips of paper on which Messina and other business representatives routinely list musicians they encounter on jobs during visits, showing the dates and location of the engagement. These handwritten reports which thereafter are filed in the Respondent Union's office, tended to establish, taken in conjunction with Messina's testimony, that certain nonunion leaders and musicians were employed at various times at Huntington. One of these reports noted Castile's appearance at Huntington on July 28, 1974.

27/ In corroboration, Neil Klein testified that when on occasion, he would call Messina's attention to the presence of nonunion bands at Huntington, Messina's standard reply would be that he could not do a thing about it. If they are not in the Union, they are not in the Union.

28/ However, there is no direct evidence that Huntington's management knew of the A.M.U. literature and verbal approaches.

29/ Leiter recalled that on one occasion during the preceding year, contrary to general practice, he did see Huntington's management deny a Local 802 delegate access to one of its rooms.

From my observation of the witnesses, noting their demeanor, the relative consistency of their testimony and the past conduct of the parties as found by the Board, I credit the testimony of Castile, Finkelstein and Orlando that on July 28, 1975, they were told by
5 representatives of the Respondent and Huntington, respectively, that, under an existing agreement between those parties, only members of the Respondent Union could perform on Huntington's premises. I also credit their testimony that Union representative Messina had that night informed them that although they would be allowed to complete that appearance,
10 should they return for a future engagement at Huntington without acquiring membership in the Respondent Union, there would be trouble. However, although at first impression, it may appear inconsistent as tending to contradict the existence of such an agreement, I also credit the testimony of Klein, Rainbow, Leiter and Messina, supported by the latter's engagement
15 reports that during the relevant period they frequently saw nonunion bands performing at private affairs in Huntington's ballrooms.

Messina's above-noted insistent testimony that he not only did not know that Del Castile was at the Huntington Town House on July 28, 1974,
20 but that he had never seen him personally does not appear to be credible. In his unsigned, but personally corrected investigatory statement to the Regional Office, Messina, contrary to his position at the hearing, had related that when he had approached the band on the evening in question, one of the musicians had specifically identified himself as Del Castile.
25 In addition, Neil Klein, who had been called by the Respondent to corroborate Messina, testified that shortly before he accompanied Messina to the Brentwood Room prior to Messina's conversation with Castile, he told Messina of the A.M.U.'s organizational effort among his musicians that evening, and his belief that the organizer, who, he identified in the record as Castile
30 was in the Brentwood Room. Accordingly, if Klein's testimony were to be accepted at face value, Messina must have known at the time that he approached the Castile band that it not only contained a musician who was not a member of Local 802, but one who had just been actively organizing on behalf of a rival union among the Respondent Union's members. This alone should have
35 made the interview more significant from Messina's standpoint. Klein's ability to overhear the conversation at the Brentwood Room bandstand from his described distance of about 25 feet would appear to be problematical.

Ciafardini was not credited in his denial that he had told
40 Castile and his musicians of the existence of the alleged "hot cargo" agreement on July 28. He testified with obvious reluctance, sought to keep his responses vague and denied having any clear recollection of what was said when he was summoned to speak to the musicians on July 28. Ciafardini originally testified that he did not know the Respondent Union,
45 a position which he subsequently modified. His testimony as to whether he had seen Local 802 delegates on Huntington's premises prior to July 28, 1974, also appeared to be less than direct.

Moreover, it is further noted that the conduct of the Respondent
50 and Huntington alleged herein is consistent with that found in the earlier case.

Accordingly, I credit the testimony of Castile, Finkelstein and Orlando that on July 28, 1974, they were told by agents of the Respondent Union and Huntington that an agreement existed whereby only Local 802 members could provide musical services on Huntington's premises.

5 As noted, the evidence that other musicians and leaders who were not members of the Respondent had performed at Huntington during the period in question without being challenged by the Respondent Union is not contradicted and is credited. However, while a finding that an
10 alleged "hot cargo" agreement may not have been universally enforced is most certainly relevant to a consideration of whether such an agreement in fact existed, it is not a prerequisite to a finding of a Section 8(e) violation that the alleged "hot cargo" agreement be enforced on a
15 nondiscriminatory basis. The language of Section 8(e) proscribes the mere entering into of such an agreement, and the enforcement of a "hot cargo" agreement at all, against any other employer or person, is unlawful. Nor does the language of Section 8(e) precondition a finding of a Section 8(e) violation upon a preliminary determination that the disputed
20 agreement had been made in writing, as the statute prohibits such agreements whether express or implied.

The critical issue herein, then, is whether on the evening of July 23, 1974, Del Castile and members of his band were informed by agents of the Respondent Union and Huntington, respectively, that the
25 alleged agreement existed and was being enforced as to them by the Respondent and Huntington. From the evidence credited above, I find that this, in fact, had occurred. 30/

30 2. The Vogue Restaurant Incident

Vogue, a restaurant that regularly engages musicians, operates in the Skyway Hotel in Queens, New York. Its stock is principally owned by Sy Cohen, whose father-in-law, Henry Cohen, is also an owner. 31/

35 The General Counsel and Charging Party contend that a musical duo known as Jeff and Phil 32/ were terminated from their employment at the Vogue Restaurant because of an alleged unwritten agreement between Vogue and the Respondent that only musicians who are members of Local 802 can perform at Vogue's premises. The existence of such an agreement is
40 denied by the Respondent Union.

30/ This matter will be further considered below in the Analysis and Conclusions.

45 31/ The record revealed that in Vogue's operation, Sy Cohen is responsible for the booking and management of talent, while Henry Cohen is customarily more involved in the administration of the restaurant, itself.

50 32/ Jeff and Phil are the professional names of Jeffrey Tillman, guitarist, and Helier Felipe, who plays the drums and sings.

The record revealed that Jeff and Phil were referred by the Carnegie Talent Agency 33/ for an engagement at Vogue starting March 12, 1975. Jeff and Phil testified that on the first night of their engagement at Vogue, Sy Cohen told them that the audience liked them very much and
 5 that they would be there for a long time. 34/

They testified that on about March 15, Cohen told them that a new delegate from the Respondent's Union had been coming around who, unlike the prior delegate, was very determined. Cohen then asked if
 10 they were members of Local 802. When Jeff and Phil answered that they were not, Cohen said that when the Union delegate eventually spoke to them, he would tell them what to do. Jeff and Phil stated that under their understanding, they did not have to be members of the Union to work anywhere. According to Tillman (Jeff), Cohen responded "To play here,
 15 you have to be a member of Local 802." 35/

On the evening of April 5, while Jeff and Phil were still working at Vogue, Mel Jefferson, the other bandleader, introduced them to Ray Cole, a delegate of the Respondent Union. 36/ Cole, Jeff and Phil proceeded
 20 to the lobby, where Sy Cohen was seated and their conversation took place there, in Cohen's presence. Cole asked Jeff and Phil if they were members of the Union. When Jeff and Phil produced their membership cards in the Allied Musicians' Union, Cole told Sy Cohen that he had to advise him that Jeff and Phil was not members of Local 802. Jeff and Phil responded
 25 that as far as they knew, they did not have to be members of Local 802 to work anywhere. Cole agreed with their statement, but said, "off the record," that he would like to let them know that A.M.U. is a "bastard union" and made uncomplimentary remarks about Del Castile and his own experiences when he had worked for Castile. Cole then told Jeff and Phil
 30 that if they wanted to advance in their musical careers, they eventually would have to join Local 802 in order to maximize their employment opportunities. According to Jeff and Phil in their respective testimony, Cole advised them that as they became better known, they would not be able to record or play the better rooms because of their nonmembership.
 35

33/ Carnegie Talent Agency, Great Neck, New York, is owned and operated by Arnold Klein, a member of the Respondent Union. Klein's booking agent-manager agreement issued by the A.F.M. under which license Klein had
 40 served as a booking agent for members of the Respondent Union, had been previously revoked by the Union as a result of an action brought against him by two musicians for alleged underpayment. Although his booking license had been revoked, Klein continued to book musicians in his capacity as a leader. Jeff and Phil were referred to Vogue by Francine Flashner, Klein's executive assistant.

34/ Sy Cohen too testified that he had been pleased by Jeff and Phil's work.
35/ Felipe (Phil) described Cohen's response as being, "Yes, that is true, but this is a union house."

36/ In accordance with the stipulation of the parties at the hearing, I find
 50 that Cole, at all times material herein, was an agent of the Respondent Union within the meaning of Section 2(13) of the Act.

When Cole stepped outside briefly to get some union literature, Sy Cohen asked Jeff and Phil why they had joined A.M.U. They replied that the A.M.U. would protect their interests and was the only union they needed. When Cole returned, Cohen offered to buy him a drink and Jeff and Phil returned to work. That was the last night they performed at Vogue.

Jeff testified that on Monday, April 7, 1975, at about 1:30 p.m., Francine Flashner, the executive assistant at the Carnegie Talent Agency, who had referred Jeff and Phil to Vogue, told him via telephone that the duo had to be members of the Respondent Union to continue to work at Vogue and that Sy Cohen was waiting to hear whether Jeff and Phil would join the Respondent Union. She gave Jeff 15 minutes to advise whether they were going to join Local 802 or lose the engagement. Jeff responded that he would have to call and speak with Phil because he could not answer for him. When Jeff succeeded in reaching Phil later that afternoon, Phil, too, expressed his refusal to join the Respondent Union. Jeff thereupon called Flashner and informed her of their decision not to become members of Local 802. Flashner replied, "Well, then, you know then that the job is terminated."

Arnold Klein, president of Carnegie Talent, testified that prior to Flashner's conversations with Jeff on April 7, he had received a call from Sy Cohen. After identifying himself, 37/ Cohen told Klein that the Union delegate had been "down" and, inasmuch as Jeff and Phil were not union, he possibly might have to let them go. Cohen stated there was a possibility of (Vogue) being picketed if the men were not taken out of the room and that he had an agreement with Local 802 to use union men. 38/ Accordingly, union men had to work the place. If it were all right with the Union, he would keep Jeff and Phil on. However, Cohen stated he would want to change the groups in the room every 4 weeks or so, but if they joined the Union, he would probably bring Jeff and Phil back because he "possibly" would like to have them back.

Klein testified that after the above conversation with Cohen, he instructed Flashner to call Jeff and Phil to determine their union status.

37/ Klein apparently had not spoken to Cohen before receiving that call.
38/ Although the Respondent introduced evidence seeking to discredit Klein as a witness, noting his difficulties with the Union resulting in the above-noted revocation of Klein's booking license and the existence of other controversies between him and the Respondent Union, Sy Cohen testified that he, in fact, did tell Klein that there was an agreement with the Respondent Union under which only Local 802 members could perform there. Cohen, however, also testified that although he had said this to Klein, no such agreement actually existed, and he had made this statement to Klein merely to get the latter "off his back." Cohen's testimony will be described in greater detail and evaluated, infra.

It was as a result of his April 7 telephone conversation with Flashner, which followed, that Jeff learned of the termination of the Vogue engagement.

5 Jeff testified that on April 8, he called Flashner again who verified that their engagement at Vogue was ended.

Del Castile, identified above as administrator of A.M.U., testified that on about April 7, 1975, he received a telephone call from Jeffrey Tillman who related to him the events leading to Jeff and Phil's termination
10 by Vogue. That night, Castile telephoned Vogue, asking to speak to the owner. His call was given to Henry Cohen. Castile told Henry Cohen that he was calling for the Allied Musicians' Union and that that union was concerned because, as he understood, two of their members (Jeff and Phil), who had been working at his establishment, were to be discontinued. He asked Cohen
15 to reconsider and let the boys stay on. Cohen, according to Castile, replied that they loved the boys but there was nothing that they could do about it. Castile asked that if they were satisfied with Jeff and Phil's performance, why must they discontinue their services. Cohen replied that he had no choice, Local 802 wanted only their members playing in his establishment.
20 Castile asked whether as the proprietor of Vogue, should not he have control over decisions to hire and discharge. Cohen agreed, but stated that he did not want any trouble with the Union. When Castile asked what he meant by "trouble," Cohen told him that the Union said that they would put pickets outside his place unless he got rid of Jeff and Phil. When Castile pressed him for
25 additional details, Henry Cohen told him that he was too busy to further discuss the matter and suggested that Castile contact his partner, Sy Cohen, who would be there the following day.

Castile and Charles Peterson, treasurer of the Charging Party,
30 both testified that they visited Vogue's premises between noon and 1 p.m. on the next day, April 8, and asked to speak to a representative of management. While waiting, they had lunch there.

While Castile and Peterson were at the table, they were joined
35 by Sy Cohen. Castile asked Cohen to let Jeff and Phil continue to work. Cohen answered that that was out of the question. They could not work there then or at any other time until they were members of Local 802. Castile asked if the boys had been doing a good job. When Cohen said that they were doing a very good job, Castile asked why Cohen insisted that they join
40 Local 802. Cohen answered, "Because this is a Local 802 house." Castile asked if Cohen had an agreement with Local 802 that only its member musicians could perform at Vogue. Cohen replied that he did not know if there is any agreement, they didn't need an agreement. Castile then asked if Cohen permitted Local 802 delegates to enter his establishment and
45 speak to musicians who are working there. Cohen replied affirmatively. In response to Castile's question, Cohen stated that he would allow the Respondent Union's delegates to enter his premises and tell nonunion musicians that if they wish to continue working there, they must join Local 802, but that he would not let A.M.U. delegates past the door. Castile
50 told him that he was favoring one union over another. Cohen responded that

it was his place and he could do what he likes. When Peterson threatened to file a charge with the National Labor Relations Board, Cohen left.

Castile and Peterson testified that after leaving Vogue, they returned to Peterson's office where they decided that Peterson should call the Carnegie Talent Agency while Castile listened on an extension line. Accordingly, at about 4 p.m. that day, with Castile on the extension, Peterson telephoned Carnegie's office and spoke to "Fran" (Flashner), who, in answer to a series of questions from Peterson, stated that she had "pulled" Jeff and Phil from Vogue because they had refused to join Local 802. Cohen had no choice as he had been told that there would be pickets in front of his place if he did not get rid of the two musicians. Flashner was indefinite as to when she might again refer Jeff and Phil to Vogue.

Sy Cohen, called by the Respondent Union, vaguely recalled having spoken to Klein at Carnegie Talent about Jeff and Phil. While he had mentioned the possibility of picketing, he did not mention names. He denied that any representative of Local 802 had threatened him with picketing if he did not let Jeff and Phil go, averring that the only threat of picketing in connection with the incident had come from Castile, who during his and Peterson's visit to Vogue, had told him that A.M.U. could very well picket him if 39/ he did not reinstate Jeff and Phil.

Cohen testified that he had released Jeff and Phil because, while he considered them to be a good musical duo, he had decided that the room required at least a trio. He stated that this was one of the reasons he had given to Klein for having terminated Jeff and Phil. Cohen explained that it was in the nature of his business that musical groups be changed because his customers wanted different sounds. In addition, at that time, he had received requests from a number of his patrons for a return engagement of Dominick Santora's Orchestra, which he described as his "regular band." 40/ As noted, Cohen admitted that he told Klein

39/ Oddly enough, Castile who had testified with great preciseness and detail in this proceeding, could not recall whether he had threatened to picket Vogue. However, it is not necessary to make a finding as to whether A.M.U. threatened to picket Vogue as such conduct is not itself an issue in this proceeding and is not prerequisite to a finding with respect to the Respondent's conduct herein.

40/ Santora's group all of whom were members of the Respondent Union, had worked intermittently at Vogue for 2 1/2 years. However, Cohen testified that he did not know whether all the musicians playing with a Local 802 leader, Mel Jefferson, appearing at Vogue at the time of the hearing, were members of the Respondent's Union but that, since Jeff and Phil's departure, Vogue has employed certain nonunion musicians. He denied that membership in Local 802 is a condition of employment at Vogue.

that he had an agreement with the Respondent Union whereby only Local 802 musicians could perform at Vogue, but denied the actual existence of such an accord. Cohen explained that he had made this statement to Klein in order to get him to stop "bugging" him about Jeff and Phil.

5 Cohen also admitted telling Tillman during his engagement that he would prefer it if Tillman belonged to a union because he liked to have people who work for him belong to a union, if possible, as they are more responsible. 41/ He denied stating that Vogue was a union house, but, in any event, the foregoing stated preference for union employees is what he meant by "union house." Cohen also recalled asking Jeff and Phil why they had joined the A.M.U. as that union did not do anything for its members and that he also had asked them to join Local 802. 42/

15 Henry Cohen testified that he had received a telephone call from Castile, whom he did not know, but when asked why Vogue had terminated Jeff and Phil, had merely replied that their customers were requesting the return of the Dominick Santora group again and there was nothing they could do about it. Henry Cohen testified that Castile had responded that his group could picket Vogue as well as anyone else can, to which Cohen had replied by threatening Castile. Henry Cohen, too, denied that Vogue had an agreement with Local 802 that only its members could perform at Vogue.

25 Although the Respondent introduced additional evidence tending to show that Klein had a history of confrontation with the Respondent Union which would motivate him to testify against the Union's interest, 43/

30 41/ Later in his testimony, Cohen stated that when he had said that he liked to have his musicians belong to a union, he was referring to Local 802 as that was the only union that he knew.

42/ Cohen's recollection of Respondent Union Delegate Cole's April 5th meeting in his presence with Jeff and Phil was also quite short. 35 Cole had described the benefits afforded by the Respondent Union to Jeff and Phil who, in turn, had shown Cole membership cards in another union. He reluctantly remembered having then told Cole that Jeff and Phil were only going to be playing for a few more days after which his regular band was returning. Cole's response was that if 40 they were going to be playing for a few more days, what is the big deal? Forget it! According to Cohen, Cole told him that if he is happy with Jeff and Phil fine. Cohen testified that Cole's business visit to Vogue was the first by a Local 802 delegate in about 6 months. 43/ In addition to the above noted difficulties which had resulted in the 45 revocation by Local 802 of Klein's booking license, the record revealed that he has been brought up on charges before the Respondent Union for his failure to have filed contracts for two engagements he had booked as a leader.

and that he is otherwise unworthy of belief, there appears to be no basis for not crediting Klein's testimony as to the events in the instant case as they are essentially uncontradicted. Accordingly, Sy Cohen corroborated Klein's testimony by admitting that he, in fact, had told Klein when
 5 advising him of Jeff and Phil's termination, that an agreement did exist between Vogue and the Respondent Union that only musicians who were members of Local 802 could perform on Vogue's premises. Also at that time, prior to any contact with Castile, Cohen conceded mentioning to Klein the possibility of Vogue being picketed. Sy Cohen also freely admitted at the
 10 hearing that he thought that Jeff and Phil had performed well and that he had been satisfied with their services. Cohen also supported the testimony of Jeff and Phil by admitting that he had asked them why they were not members of Local 802 and had urged them to join that Union. 44/

15 From my observation of the witnesses as they testified at the hearing, 45/ noting also the timing of the termination of Jeff and Phil, which occurred almost immediately after they had shown Cole their A.M.U. membership cards, the fact that their aborted engagement was inconsistent with Jeff and Phil's satisfactory work performance, the extent to
 20 which Sy Cohen had corroborated the testimony of Klein, Jeff and Phil, by admitting the existence of the alleged agreement and by other testimony as discussed above, and the adverse inference drawn herein from the failure of the Respondent Union to call Ray Cole 46/ as a witness to these events,

25 44/ Although, as noted, there is testimony that Jeff and Phil were terminated almost immediately after they showed Respondent Union delegate Ray Cole their A.M.U. membership cards, that Sy Cohen had informed
 30 Arnold Klein of the existence of the alleged "hot cargo" agreement between Vogue and Local 802 and that that Union would picket Vogue to enforce the agreement, the Respondent Union failed to have its delegate, Cole, testify at the hearing. These circumstances give rise to an inference that if such testimony had been elicited, it would have been adverse to the Respondent Union. See the discussion in
 35 International Union United Automobile, Aerospace and Agricultural Implement Workers of America (UAW) (Gyrodyne, Inc.) v. N.L.R.B., 459 F. 2d 1329 (C.A. D.C. 1972), cited with approval in Sheldon Pontiac, Inc., 199 NLRB 950, 954.

40 45/ Sy Cohen testified with great reluctance and impreciseness, frequently asserting his inability to recall relevant events and the extent of his participation therein. Inter alia, he neither denied nor recalled whether he also had told Castile and Peterson during their meeting that musicians who performed at Vogue had to be members of Local 802. Accordingly, I do not credit Cohen's testimony to the extent that it conflicts with that rendered by other witnesses in this proceeding.

45 46/ As noted, no representative of the Respondent Union even appeared to deny the existence of the alleged unlawful agreement with Vogue.

I do not credit Cohen's denials that a "hot cargo" agreement in fact existed between Vogue and the Respondent Union. 47/

C. The Alleged Violation of Section 8(b)(4)(ii)(B) of the Act.

The Alleged Threat to Picket at the
Queens Center Mall

10 The General Counsel contends that the Respondent Union threatened
the Queens Center Merchants Association, Inc., 48/ herein called the
Association, a neutral employer, that it would engage in unlawful common
situated picketing at the Queens Center Mall, herein called the Mall, a
shopping center, to compel the Association to cease doing business with
15 an orchestra whose nonunion leader was under contract with the Association
to provide concerts at the shopping mall. Although the picketing allegedly
threatened did not occur, the General Counsel further argues that an
unusually large number of delegates from the Respondent Union appeared
at the concert, with a coercive effect. The Respondent denied
20 the foregoing allegations, except that it conceded the presence of three
of its delegates at the concert.

47/ It appears that Henry Cohen, who testified more forthrightly than
25 did his partner, Sy Cohen, should be credited as to the substance
of the April 7 telephone conversation with Castile, whose account
of the incident appeared a bit too pat. That Henry Cohen would so
unburden himself to a stranger on the telephone in the complete
manner described by Castile appears to be most unlikely and is
30 contrary to my observation of Henry Cohen as a blunt, business-like
witness. Nonetheless, Henry Cohen was not the central witness that
Sy Cohen was and participated in fewer of the relevant events. It
may be that certain nonunion leaders and musicians have performed
at Vogue during the times relevant herein without being challenged
35 by the Respondent, as was testified to by Sy Cohen. However, as
discussed above in connection with the present Huntington matter,
evidence to that effect would be but one factor to be considered in
seeking to determine whether the alleged "hot cargo" agreements, in
fact, exist. However, a conclusion that certain nonunion musicians
40 have performed at Vogue would not necessarily preclude a finding that
an agreement of the type alleged by the General Counsel had been
enforced in a discriminatory basis against the immediate parties
herein, whether because of their A.M.U. membership or for some other
reason. In the instant matter, the weight of the credited testimony, in
45 my view, is supportive of the General Counsel's position.
48/ As set forth above in the jurisdictional discussion, the Association,
located in the Queens Center Mall, Queens, New York, is engaged in
promoting the businesses of its members, which are various firms with
retail stores situated in the Mall. Member firms include
50 Abraham & Straus, Herman's World of Sporting Goods and Ohrbach's.
There are also about 39 satellite retail stores in the Mall, operated
by small merchants. The Mall has four shopping levels and a six level
parking garage. The only direct entrance to the Mall is on Queens Boulevard
at its intersection with Woodhaven Boulevard.

Yolanda N. Goldstein, advertising and promotion director of the Association, testified that in 1974, she entered into a contract on behalf of the Association with Bob Chevy, 49/ an orchestra leader. Under the terms of this agreement, Chevy and his orchestra were to perform a series of concerts at the Mall on four consecutive Tuesday evenings, commencing on July 9, 1974, to provide musical entertainment for the shoppers.

Goldstein testified that during the afternoon of July 9, the day of the concert, she received a telephone call from Al Brown, 50/ who identified himself as a delegate of the Respondent Union. Brown asked if Goldstein was having concerts at the Mall. Goldstein said "yes" and, in response to her inquiry, was told that Brown had learned of the concerts from the newspaper advertisements. Brown asked if there were going to be union members there. Goldstein answered that she did not know or care. Brown asked how the contract (with Chevy) read, but Goldstein declined to divulge that information. Brown stated that he believed that 90 percent of the Mall shoppers were union members and if they found out that the Association was not having union members as performers in the Mall, these

49/ As noted, Bob Chevy is the professional name of Robert Ciavolino. Chevy testified that he has had a history of differences with the Respondent Union at various times since about 1956 when he first became a member of Local 802. Accordingly, his membership status had changed from time to time, at the will of the Respondent, and he was not certain of his membership at the time of the hearing. Although Chevy was party to a collective bargaining agreement with the Respondent Union, executed May 11, 1973, and effective retroactively from March 26, 1972, to March 25, 1975, pursuant to which he recognized Local 802 as the bargaining representative for all musicians to be employed by him in the single engagement field, he related that at different intervals since the execution of the agreement, he has had discussions with representatives of the Respondent Union as to whether he was employing its member musicians. As of the time of the hearing, no new contract with the Respondent Union had been negotiated to replace the one that had expired on March 25, 1975. In addition, Chevy testified that as of the time of the hearing, his orchestras were being sued for alleged nonpayment of fringe benefit contributions on behalf of musicians he had employed. This suit arose under the terms of the then unexpired collective bargaining agreement with the Respondent Union.

50/ In accordance with the stipulation of the parties at the hearing, I find that Al Brown, at all times material herein, was an agent of the Respondent Union within the meaning of Section 2(13) of the Act. Brown testified that he is an elected member of the Respondent Union's Board and is in charge of that Union's single engagement contractor department and acquainted with Bob Chevy.

customers would no longer shop there. Brown also told Goldstein that if she did not have union members at the concert, he would picket right out in front of the Mall on Queens Boulevard. 51/ Goldstein replied that she was not aware of any law that required her to have union members at the
 5 concerts and asked Brown if that was a threat. Brown answered that unions don't have to threaten—they are too strong. Goldstein replied that she could only consider that to be a threat.

According to the testimony of Chevy and his secretary,
 10 Josephine Spinelli, the latter received a telephone call at approximately 2 p.m. on July 9 from Goldstein. 52/ Goldstein told Spinelli that she had been called by Al Brown of Local 802, who had wanted to know if the musicians were union members. If they were not, the Union was going to picket. Goldstein requested an assurance that nothing was going to happen. Spinelli
 15 told Goldstein not to worry, that they would communicate with the Union and speak to her again.

Spinelli then reported the call to Chevy who asked her to telephone Brown at the Respondent Union's hall to find out what the matter was about, while he listened on an extension. Accordingly, with Chevy and another musician listening on extension lines, Spinelli phoned Brown 53/ and asked if he had called Goldstein. Brown said that he had. When Spinelli told him that he had no right to call and threaten a customer and that he should have called Chevy's office if he had any questions concerning
 25 the musicians as she would have been glad to answer them, Brown yelled, "Don't tell me what I can or can't do." I can call anybody I want to and say anything I want to say, and hung up. There was no mention of picketing during this conversation.

That evening, Spinelli attended the Chevy Orchestra concert at the Mall, which proceeded without picketing or other interruption. It is not disputed, however, that Brown and two other business representatives of the Respondent Union, Joseph Roccaforte and Basil Basile, 54/ also were at the concert. Chevy testified that at the conclusion of the performance,
 35 all three representatives approached the stand and spoke to him, asking why did he not come up to the Union and straighten the whole thing out. Chevy replied that he would. 55/

40 51/ According to Goldstein, during that conversation, Brown also stated that he would come down to the concert and personally check everyone's union card.

52/ Spinelli testified that Goldstein was in a state of hysteria.

45 53/ Spinelli testified that she had recognized Brown's voice as she knew him "pretty well."

54/ Spinelli testified that in her experience it was unusual for three union delegates to appear at a given concert. Usually, this was done by one delegate.

50 55/ The General Counsel does not contend that any of the three remaining performances under Chevy's contract with the Association were in any way interfered with by the Union.

Brown, called as a witness by the Respondent, testified that on the afternoon of on or about July 9, 1974, after reading in the newspapers that Bob Chevy's Orchestra would be performing at the Queens Mall, he had placed a call to Yolanda Goldstein and asked if she had a contract with Bob Chevy. Brown did not fully remember her answer, but recalled that Goldstein had asked, "What if I have a nonunion band?" Brown told Goldstein that he imagined that 80 or 90 percent of the people who shopped in that district are union people. However, contrary to Goldstein's testimony, Brown did not say that they would not cross a picket line, as he did not know what they would do. Brown did tell Goldstein that he thought it would be the Union's privilege to advertise with picket signs that that particular band is nonunion. 56/

Brown stated that on the evening in question, he attended Chevy's concert at the Queens Mall accompanied by his two colleagues, Basile and Roccaforte, 57/ and, after the performance, had congratulated Chevy on his concert. Brown also testified that he and his colleagues also greeted the musicians in Chevy's orchestra as old friends. Although they found that Chevy's musicians that night were members of Local 802, Brown testified that his union did not picket that night as they had had no prior intention of so doing. 58/

56/ Brown denied telling Goldstein that the Respondent Union would picket if a nonunion band performed, on the ground that he had sufficient experience after 40 years in his position to know the Respondent's rule that picketing must be approved in advance by the Local 802 executive board and by its attorneys. He also expressly denied that he had told Goldstein who or where they would picket.

57/ Brown explained that the three delegates were at the Chevy concert because Chevy had a history of not cooperating with the Union and of violating his contract, then in effect, by not filing contract engagement reports as to which musicians he was employing so that pension and welfare payments could be collected on their behalf. Similarly, Chevy's musicians also tended not to talk to union representatives. As the Union has about 25,000 members, there are times when delegates visiting jobs did not recognize the musicians present. In view of the anticipated noncooperation from Chevy and his musicians, and to increase the Respondent's chances of recognizing his musicians, the three delegates had attended the concert. The Union might assign three delegates to attend the same single engagement about 3 to 5 times a year. The Respondent's members play approximately 50,000 single engagements a year. Brown described Roccaforte and Basile as being members of the Respondent Union's trial board, an intra-union panel that hears complaints brought by members against each other or against leaders, but contended that it is customary for members of the Respondent Union's executive and trial boards to check out jobs.

58/ Brown, when questioned as to whether he had known that Chevy was not a member in good standing of the Respondent Union since 1971, did not answer directly, but merely replied that he had treated Chevy as a signatory party to their collective bargaining agreement.

From the foregoing, the General Counsel, as noted, contends that the testimony of his witnesses, if credited, would establish that the Respondent Union had not merely threatened to picket Bob Chevy, with whom it had its primary labor dispute, on July 9, but that, in violation of Section 8(b)(4)(ii)(B) of the Act, it had threatened the Association, a neutral employer, to the effect that it would place its pickets at the Association's Queens Mall entrance with ambiguously worded picket signs. It thus is asserted that the Respondent Union thereby threatened to picket the entire Mall and the Association's member firms doing business therein, to compel the Association to cease doing business with Chevy.

The Respondent Union to support its position that, at most, only the possibility of its engaging in lawful primary picketing was mentioned by Brown to Goldstein, indicates in its brief, Brown's testimony wherein he denied having threatened to picket the stores in the Mall or that there had been any discussion as to any particular place in the vicinity of the Mall where picketing might occur. The Respondent Union also emphasized Brown's testimony that he had clearly conveyed his union's intention only to picket the particular band involved. ^{59/} It is further argued that the fact that no picketing or other disturbance actually took place is further reason for not crediting the General Counsel's witnesses.

However, from my observation and evaluation of the witnesses at the hearing, I would credit Goldstein's account of her July 9 conversation with Brown. As the General Counsel indicates, Goldstein is a comparatively disinterested witness, who, prior to her conversation with him on that date, had not known Brown. Goldstein gave her testimony with clarity and precision. In addition, the testimony of Chevy and Spinelli with respect to Spinelli's conversation with Brown, which tended to follow and corroborate Goldstein, was not denied by Brown, and is therefore credited. In contrast, Brown's testimony seemed ambiguous at points. As noted, although requested, he did not directly respond to questions concerning whether, at the time in question, he knew that Chevy was not a member in good standing of the Respondent Union and did not recall the entirety of his conversation with Goldstein. However, he did corroborate Goldstein in certain respects, such as that segment concerning the percentage of shoppers in the Mall's area who are union members. The seriousness with which Brown apparently regarded the Chevy engagement was further evidenced by his strong reaction to Spinelli's call as related by her, and the fact that he and two other senior representatives appeared at the concert. As noted, this type of coverage of a single engagement might occur at about three to five of approximately 50,000 engagements a year. ^{60/} This additional evidence of Brown's reaction to the Chevy engagement tends to lend further credence to Goldstein's testimony and tends to detract from Brown's effort to present the matter as a more casual occurrence.

^{59/} Brown's testimony did not include a reference to a conversation with Spinelli, Chevy's secretary.

^{60/} As to the Respondent's observation that no picketing ever occurred, it, of course, is speculative to consider here what the Union's course would have been for the remainder of the concert series had it not been found that Chevy's musicians were members of the Respondent Union.

D. Analysis and Conclusions

1. The Alleged Section 8(e) Violations

5 Section 8(e) of the Act makes it an unfair labor practice for
a union "to enter into any contract or agreement, express or implied,
whereby such employer ceases . . . doing business with any other person
and any . . . such . . . agreement shall be to such extent
10 unenforceable and void." The primary employers or persons
herein, with whom the Respondent Union had its disputes, were Del Castile
and Jeff and Phil, respectively, the bandleader and duo who were not
members of Local 802. The respective secondary employers were
Huntington and Vogue.

15 In Associated Musicians of Greater New York, Local 802,
American Federal of Musicians, AFL-CIO, (Huntington Town House, Inc.), 61/
the following was noted:

20 Statutory language, as well as legislative
history, demonstrate that Congress adopted a broad
and comprehensive ban against "hot cargo" provisions.
See N.L.R.B. v. I.B.E.W., Local Union No. 769
(Ets-Hokin Corp.), 405 F.2d 159, 164 (C.A. 9, 1968)
cert. denied, 395 U.S. 921, enforcing 154 NLRB 839;
25 Employing Lithographers of Greater Miami v. N.L.R.B.,
301 F.2d 20, (C.A. 5, 1962) enforcing as modified,
130 NLRB 968. Section 8(e), on its face, proscribes
not only hot cargo contracts, but also 'agreements';
and it bars not only express hot cargo clauses, but
30 those which may be implied. 62/

 The credited testimony and the inferences to be drawn
therefrom support the allegations of the complaint that the Respondent
Union with Huntington and Vogue, respectively, during the relevant
35 periods, maintained and enforced illegal "hot cargo" agreements,
arrangements or understandings. 63/

 In so concluding with respect to the events at Huntington,
it is noted from the credited testimony, that Messina and Ciafardini,
40 representatives and agents of the Respondent Union and Huntington,
respectively, specifically told Castile and his musicians of the
existence of an agreement whereby only Local 802 bandleaders and
musicians were to perform for patrons on Huntington's premises. It
is further noted that although Messina permitted the performance to
45 continue, he threatened that there would be "trouble" if they were to
return for future performances at Huntington without membership in

61/ 203 NLRB 1078, 1082.

50 62/ As proscribed "hot cargo" agreements may, by definition, be implied
from the surrounding circumstances, as noted, it is not necessary
that they be in written form.

63/ See 203 NLRB 1078.

the Respondent Union. This is corroborated by Ciafardini's response on learning of Castile's meeting with Messina, at which time he asked whether Castile would be permitted to finish the engagement.

5 Although this case is no exception to the general rule that each matter should be adjudicated on its own facts, in the context of the credibility resolutions detailed above, it is relevant to consider the recent history of the Respondent Union and Huntington. In the 1973 case involving the Respondent and Huntington, it was concluded that at the time of the hearing of that matter, and for 12 years prior thereto, there existed a written clause in Huntington's contracts with its patrons to the same effect as the unwritten agreement alleged to be unlawful herein. Accordingly, it was found that the disputed agreement in that case had long been effectuated by these same parties. The Respondent 15 Union argues that the experiences of the parties in complying with the remedies ordered in the prior case would make it unlikely that they would do the same things all over again at this time. Yet, the facts of that earlier matter have not been rendered completely obsolete. One of the Respondent Union's defenses, noted in the earlier case, was that 20 it had only "exercised its discipline . . . against its own members by notifying them that playing with a nonunion musician constituted a violation of the (Union) bylaws." The Administrative Law Judge, in his Board-adopted decision, rejected this defense with the following observation:

25 As to the latter contention, Respondent's defense involves action in itself illegal and therefore does not immunize its conduct. As the Board put it in one of the two cases involving this very Respondent and Charging Party, Local 802 violated Section 8(b)(4)(ii)(A) and (B) by maintaining bylaw provisions prohibiting its members from playing in an orchestra led or conducted by a nonmember of Local 802 or in which a nonmember plays an instrument or performs, any other work of a musician. 35 Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (Random Travel, Inc., and National Association of Orchestra Leaders), 171 NLRB 1106. To the same effect, see Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (National Association of Orchestra Leaders), 176 NLRB 198, 206. 40

45 Despite the prior adjudications referred to above, the record in the instant case revealed that the same provision was still among the Respondent Union's bylaws at the time of the hearing herein. 64/

50 64/ See the Respondent Union's bylaws, Article IV(H), set forth above in footnote 15. It is of course true that in the absence of evidence that Respondent's officials had made a direct approach to or had undertaken conduct directed at an employer, such as Huntington, for the purpose of causing the employer to discriminate by implementing the Union bylaw through his hiring practices or otherwise, such a bylaw provision constitutes a rule prescribed by a labor organization with respect to the acquisition and (Continued)

As there is no complaint allegation or evidence that the relevant bylaw in the instant case was urged upon Huntington or any other employer as a basis for actions to be taken, there is no finding herein of a violation in connection therewith. Nonetheless, as noted, this bylaw provision has been implemented in the past and its continued standing among the Respondent Union's basic governing rules indicates that the agreement found unlawful herein is fully consistent with the Respondent Union's written policies. 65/

In concluding that Jeff and Phil's termination by Vogue was an effectuation of a like agreement between the Respondent Union and Vogue, from the credited testimony, reliance is placed upon the admitted statement by Sy Cohen that he had told Arnold Klein of Carnegie Talent that Vogue, in fact, had such agreement with the Respondent Union; that there was a possibility that Vogue would be picketed in connection therewith; Cohen's statement to Jeff and Phil that the Respondent's delegate was earnestly enforcing Local 802's membership requirement; that Vogue was a "union house"; his urging that Jeff and Phil join Local 802; and the timing of the abrupt termination of Jeff and Phil by Vogue after they had made known to the Respondent Union's delegate, Cole, that they were members of a rival union. 66/ It is further noted that Jeff and Phil's termination was inconsistent with Sy Cohen's admitted satisfaction with their work and his stated prior anticipation that Jeff and Phil would have a long engagement. From the credited testimony of Tillman, corroborated in part by Klein, it is found that Jeff and Phil were advised by Flashner, from information received from Cohen, that their continued employment at Vogue depended upon their willingness to become members of the Respondent Union.

In Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (Dante Caterers, Inc.), 67/ cited by the Respondent Union in its brief, the Board dismissed a complaint against the instant Respondent that alleged violations of Section 8(b)(4)(ii)(A) and 8(e) of the Act of a type similar to those in the earlier Huntington Town House case, supra, on grounds that the asserted unlawful understanding and threats in Dante Caterers had not been established by direct, unambiguous evidence. 68/ The present proceedings, as

64/ (Continued)retention of membership, and, as such, is protected by the proviso to Section 8(b)(1)(A) of the Act. See Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (Joe Carroll Orchestras), 176 NLRB 365.

65/ These observations are in accordance with the Board's policy of considering relevant conduct by the same parties in earlier cases as background evidence. See Federal Pacific Electric Company, 203 NLRB 571, fn. 1.

66/ Cole's hostility to A.M.U. expressed during that meeting is also noted.

67/ 212 NLRB No. 79.

68/ In Dante Caterers, supra, the Board noted that in addition to the absence of direct evidence to support the General Counsel's allegations, no interference actually occurred. The band allegedly challenged by the Respondent Union completed its engagement and was not fired.

they relate to Huntington and Vogue, appear to be distinguishable from Dante Caterers, supra, as, inter alia, the evidence of misconduct is more direct. Moreover, the disputed agreement was successfully enforced against Jeff and Phil. In the instant Huntington case, unlike Dante Caterers, it was found that both management and union representatives directly informed Castile and his musicians that there was an agreement that only Local 802 bands could play at Huntington's and the Union representative, Messina, threatened that there would be "trouble" if Castile and his musicians returned to Huntington without first acquiring membership in Local 802.

The Vogue case herein is also materially distinguishable from Dante Caterers. In Vogue, Sy Cohen as a representative of management directly affirmed the existence of such an agreement to Klein, a third party, and mentioned that his business could possibly be picketed; announced to the musicians in question that Vogue was a "union house" and discharged them without cause immediately after their adverse interview with the Local 802 delegate and their stated continued refusal to become members of the Respondent Union. Accordingly in Vogue, contrary to Dante Caterers, in addition to the other direct evidence of the existence of a "hot cargo" agreement, noted above, the employment of the non-Local 802 musicians at Vogue and Huntington was directly and abruptly affected.

It, therefore, is concluded that the preponderance of substantial credible evidence supports the complaint allegations that the Respondent Union violated Section 8(e) of the Act by maintaining and enforcing illegal "hot cargo" agreements with Vogue and Huntington, respectively, during the periods involved.

2. The Alleged Section 8(b)(4)(11)(B) Violation

The credited evidence revealed, inter alia, that on the afternoon of July 9, 1974, the Respondent's delegate, Brown, told Goldstein, an official of the Association, that if union members did not perform the Chevy orchestra concert, he would place pickets on Queens Boulevard in front of the Mall. As noted, the Mall has but one main entrance. Brown, too, testified that he had spoken to Goldstein of the possibility of establishing what would be, in effect, an informational picket line directed to consumers visiting the Mall.

The test for whether a mention of the possibility of an informational picket line is, in and of itself, a threat within the meaning of the Act was stated by the Board in United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 639 (American Modulars Corporation), 69/ where it said:

69/ 203 NLRB 1112, fn. 1.

Like the Administrative Law Judge, we find that the statement of Respondents to American's area manager, concerning the possibility of 'informational' picketing at the Sherwood, jobsite unless the latter's subcontractor, Sondles, the primary employer herein, became unionized, constituted a threat with the meaning of Section (b)(4)(B). This statement, by its breadth contemplated picketing of the entire jobsite and anyone working there whether connected with the primary or neutral persons or employees. As such, it went beyond the mere giving notice of prospective picketing against a subcontractor to a general contractor. Cf. Construction, Building Material and Miscellaneous Drivers Local Union No. 83, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Ind. (Marshall and Haas), 133 NLRB 1144, 1146.

In America Modulares, the threat was uttered in a context which included picketing and the principal issue discussed by the Board was whether the signs that had been used met the Moore Dry Dock standards. ^{70/} American Modulares differs from the instant case, however, for in that matter there was picketing which took place at a jobsite, while here there was merely a threat to picket and the common situs is a retail shopping center.

The Respondent, in its brief, has sought to support its position by arguing, inter alia, that no picketing actually had occurred. However, the Board has found violations of Section 8(b)(4)(ii)(B) in situations where no picketing has followed the words claimed to be Subsection (ii) threats. In General Teamsters, Warehouse and Dairy Employees Union Local 126, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, et al. (Ready Mixed Concrete, Inc.), ^{71/} the Board said:

The Trial Examiner also found that Teamsters Business Representative Richmeier's threat to Tiede's superintendent to put up a picket line unless Tiede discontinued its purchases of concrete from RMC did not violate Section 8(b)(4)(ii)(B) of the Act because there was no evidence 'that the inducement offered by Richmeier was effective' A threat to an employer to picket is itself coercive, whether or not the picketing is subsequently instituted, and if the threat is intended to achieve an object prohibited by Section 8(b)(4)(B), as in this case, it is violative of Section 8(b)(4)(ii)(B). We therefore find, contrary to the Trial Examiner, that Richmeier's threat to Tiede violated Section 8(b)(4)(ii)(B) of the Act. ^{72/}

^{70/} See Sailors' Union of the Pacific, AFL (Moore Dry Dock Company), 92 NLRB 547.

^{71/} 200 NLRB 253, fn. 2.

^{72/} In Ready Mixed Concrete, supra, also, the principal issue before the Board was the legitimacy of the picketing which had taken place, not an issue here.

If Brown's statement to Goldstein were to be construed as a threat to engage in consumer picketing at the mall, from the credited testimony, it cannot be found that Brown's threat to picket at the common situs shopping center was so phrased as to indicate an intent to picket in conformity with the standards of specificity established in the Tree Fruits 73/ case. 74/ It would appear from Tree Fruits and from cases that followed that in order to come within the Tree Fruits doctrine, a union must meet criteria reminiscent of those adopted by the Board in common and moving situs picketing situations concerning the timing and location of the picketing and the specificity of the Union's appeal. 75/ In the instant case the threat to picket was not specific as to the nature of the appeal that would be made to the public. 76/ As noted from American Modulars, supra, when such a broad threat to picket is made, there is no advance presumption that it will be sufficiently restricted in its scope and appeals to the public as to remove it from the proscription of Section 8(b)(4)(ii)(B) of the Act.

A not less compelling reason for finding that the threat herein would be outside of the Tree Fruits doctrine of permissible consumer picketing relates to the significance that the Board has placed upon the presence or absence of a tangible struck product or service offered to

73/ N.L.R.B. v. Fruit & Vegetable Packers and Warehousemen, Local 760, 377 U.S. 58 (1964). In Tree Fruits, the Supreme Court enunciated a doctrine of limited consumer boycott privilege, holding that a union did not violate Section 8(b)(4)(ii)(B) of the Act when, in furtherance of its dispute with packers of Washington State apples, it picketed stores selling their product with signs appealing to members of the consuming public not to buy the specific product in dispute. In so concluding, the Court noted that the "isolated evil" that required proscription of peaceful picketing at secondary sites "was its use to persuade the customers of the secondary employer to cease trading with him in order to force him to cease dealing with the primary employer." In the Court's view, there existed a major difference between that type of unlawful consumer picketing and that effectuated in the Tree Fruits case, where, from the unambiguous picket signs utilized, it was clear that the peaceful picketing at the common situs shopping area was directed only at the struck product. In such circumstances, the Union's appeal to the public was found to be lawful, as the public is not asked to withhold its patronage from the secondary employer, but only to boycott the primary employer's foods or services.

74/ The Respondent Union in its brief did not specifically refer to the applicability of the Tree Fruits doctrine, but presented what was principally a factual argument. The Respondent's position is that the testimony of its witnesses, if credited, would establish that Brown had voiced no more than a specifically pressed intent to engage in what would be lawful picketing.

75/ Alton Wood River Building and Construction Trades Council, AFL-CIO, et al., 154 NLRB 982; Local No. 550, Carpenters (Steiner Lumber Co.), 153 NLRB 1285, enfd. 367, 953 (C.A. 9, 1966).

76/ It was also unclear as to precisely who would be picketed and where the threatened picketing would take place.

consumers. In the instant matter, the disputed service did not consist of a tangible struck product such as the Washington State apples in the Tree Fruits case, which consumers could, at their option, purchase or forego without otherwise affecting their relationship with the neutral vendors. Here the product consisted of musical services that neither the Association nor any of its member retailers were purveying to its customers. 77/ Had the shoppers at the mall been called upon to observe the boycott, as threatened, they would have been obliged to cease doing business with the Association and its neutral member firms.

For the foregoing reasons, I find that the Respondent Union by its above conduct violated Section 8(b)(4)(ii)(B) of the Act. 78/

IV. The Effect of the Unfair Labor Practices Upon Commerce

The activities of the Respondent Union set forth in section III, above, occurring in connection with the operations of the respective Employers set forth in section I, above, have close, intimate and substantial relations to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow thereof.

77/ Local 254, Building Service Employees International Union, AFL-CIO (University Cleaning Co.), 151 NLRB 341, 347.

78/ Cf. International Brotherhood of Electrical Workers, AFL-CIO, Local Union No. 38 (Cleveland Electro Metals Company), 221 NLRB No. 173; International Union of Operating Engineers, Local 17, 17A and 17B, AFL-CIO (Firelands Sewer and Water Construction Co., Inc.), 210 NLRB No. 30. In those cases, no violations were found with respect to threats by unions to respective neutral employers that they would engage in informational picketing at common situses in an unspecified manner if non-union contractors, with whom the Unions had their primary disputes, were awarded contracts. In finding that the context in which these statements were made did not constitute threats to picket neutral employers, the Board noted that the conversations at the time the alleged threats were uttered had centered on the non-union primary employers, no other contracts had been awarded and no other contractors or subcontractors were involved or discussed and the statements were made in response to a question as to what the Unions would do. In the instant case, contrary to Cleveland Electro Metals, supra, and Firelands Sewer, supra, the common situs is a shopping center where over 40 neutral employers are regularly engaged in the conduct of their business. Accordingly, the contextual presumption that the broad threat to engage in informational picketing herein would be directed only against the primary employer is proportionately diluted. In addition, unlike the above-cited cases, in the present matter the threat to picket was not an elicited response to a question put to the Union by a neutral employer, but was originated by the Respondent Union on its own initiative as a statement of its aggressive intent.

V. Conclusions of Law

1. Jurisdiction is properly asserted in this proceeding.

2. The Respondent Union violated Section 8(e) of the Act by maintaining and enforcing agreements, arrangements or understandings with Huntington and Vogue, respectively under which only Local 802 band leaders and musicians would be allowed to perform on the premises of Huntington and Vogue.

3. By threatening, coercing, and restraining the Queens Center Merchants Association, Inc., with an object of forcing or requiring the Association and other persons to cease doing business with Bob Chevy, a non-union band leader, Respondent violated Section 8(b)(4)(ii)(B) of the Act.

4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

VI. The Remedy

Having found that the Respondent Union has engaged in unfair labor practices within the meaning of Section 8(e) and 8(b)(4)(ii)(B) of the Act, I shall recommend that the customary cease-and-desist order and the usual affirmative relief ordered in cases of this nature, including the posting of notices. In view of the fact that Respondent has been found to have engaged in secondary activity violative of Section 8(b)(4) in several adjudicated cases, 79/ I find that there is real danger that Respondent may in the future engage in unlawful activity of the same or similar nature as that here found. Accordingly, I shall recommend a broad order designed to extend the protection of the Act to primary and secondary employers other than those here involved. 80/ It will also be recommended that the Respondent Union be required to publish the notice attached hereto in an issue of Allegro, the official publication distributed monthly to all of its members, or any equivalent publication. 81/

79/ Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (Huntington Town House, Inc. and the National Association of Orchestra Leaders), supra, 203 NLRB 1078; Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (National Association of Orchestra Leaders), supra, 176 NLRB 198; Associated Musicians of Greater New York, Local 802 (National Association of Orchestra Leaders), supra, 171 NLRB 1106.

80/ See Associated Musicians, etc., Local 802, supra, 203 NLRB 1078; Associated Musicians, etc., Local 802, supra, 176 NLRB 198, fn. 2; Associated Musicians, etc., Local 802 (Random Travel, Inc.), supra, 171 NLRB 1106.

81/ In Associated Musicians, etc., Local 802, supra, 203 NLRB 1078, the the earlier Huntington Town House case, it was determined that the remedy ordered therein, contrary to those in the cases cited above at 176 NLRB 198 and, 171 NLRB 1106, should not include a requirement that the Respondent Union also publish the remedial notice in Allegro. There, unlike the noted earlier cases, there was no evidence that the Respondent Union had utilized Allegro to further the (Continued)

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby recommend the following: 82/

ORDER

Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO, the Respondent herein, its officers, representatives, and agents, shall:

1. Cease and desist from:

(a) Enforcing, maintaining, or otherwise giving effect to any agreement, arrangement, or understanding with Huntington Town House, Inc., Vogue Restaurant, Inc., or with any other employer, whereby such employers agree that only the Respondent's members be allowed to provide or perform services as musicians or band leaders.

(b) Threatening, coercing or restraining Queens Center Merchants Association, Inc., or any other person engaged in commerce or in an industry affecting commerce, where, an object thereof is to force or require the Queens Center Merchants Association, Inc., or any other person, to cease doing business with Robert Ciavolino, doing business under the name Bob Chevy Orchestras, or with any other person.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its office, place of business and meeting places, copies of the attached notice marked "Appendix." 83/ Copies of said notice,

81/ (Continued) illegal activity by publicizing it. However, while there also is no evidence in the instant case that actions found unlawful had been published in Allegro or any other publication of the Respondent Union, it is relevant to note from the cases cited that the misconduct found herein is not isolated but is of a recurring nature. Unless adequate notice is given of the Order in this matter, these activities might well continue or be resumed. The requirement that the Respondent Union publish a notice of the Order at least once in its publication generally distributed to its membership appears to be a reasonable requirement in light of the circumstances here involved. N.L.R.B. v. United Brotherhood of Carpenters and Joiners of America, 321 F. 2d 126, 129-130 (C.A. 9, 1963), cert. denied 375 U.S. 953.

82/ In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, recommendations, and recommended Order herein, shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

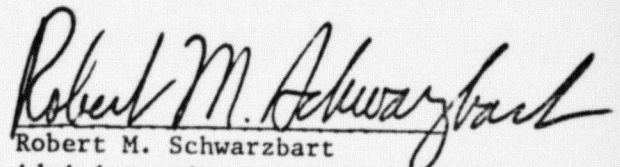
83/ In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

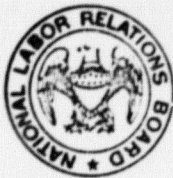
on forms provided by the Regional Director for Region 29, after being
duly signed by the Respondent Union's representative, shall be published
in a following issue of Allegro or any other equivalent official publica-
tion of the Respondent Union distributed to its general membership; be
5 posted by Respondent immediately upon receipt thereof and maintained by
it for 60 consecutive days thereafter, in conspicuous places, including
all places where notices to members are customarily posted. Reasonable
steps shall be taken by Respondent to insure that said Notices are not
altered, defaced, or covered by any other material.

10 (b) Furnish said Regional Director with signed copies
of the aforesaid Notice for posting if desired by any employer or person
involved in this proceeding, at places where they customarily post notices
to employees.

15 (c) Notify the Regional Director for said Region 29, in
writing, within 20 days from the receipt of this Order, what steps have
been taken to comply herewith.

Dated at Washington, D. C.


Robert M. Schwarzbart
Administrative Law Judge



NOTICE TO MEMBERS



POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING AT WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, IT HAS BEEN FOUND THAT WE, ASSOCIATED MUSICIANS OF GREATER NEW YORK, LOCAL 802, AMERICAN FEDERATION OF MUSICIANS, AFL-CIO, HAVE VIOLATED THE LAW AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND ABIDE BY ITS TERMS.

WE WILL NOT enforce, maintain, or otherwise give effect to any agreement or understanding with MONTINGTON TOWN HOUSE, INC., VOGUE RESTAURANT, INC., or any other employer, whereby such employers agree to allow only Local 802 member musicians and bandleaders to perform on their premises.

WE WILL NOT threaten, coerce, or restrain QUEENS CENTER MERCHANTS ASSOCIATION, INC., or any other person engaged in commerce or in an industry affecting commerce, where an object thereof is to force or require the QUEENS CENTER MERCHANTS ASSOCIATION, INC., or any other person, to cease doing business with ROBERT CIAVOLINO, doing business under the name BOB CHEVY ORCHESTRAS, or with any other person.

ASSOCIATED MUSICIANS OF GREATER NEW YORK
LOCAL 802, AMERICAN FEDERATION OF
MUSICIANS, AFL-CIO
(Labor Organization)

Dated _____ By _____ (Representative) _____ (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 16 Court Street, 4th Floor, Brooklyn, NY 11241
(Tel. No. 212 - 666-5386).

225 NLRB No. 74

MJW

D-1455

Brooklyn, N.Y.

FILE
Exec. Sec. 0

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ASSOCIATED MUSICIANS OF GREATER
NEW YORK, LOCAL 802, AMERICAN
FEDERATION OF MUSICIANS, AFL--CIO
(Huntington Town House, Inc.)

and

NATIONAL ASSOCIATION OF ORCHESTRA
LEADERS

ASSOCIATED MUSICIANS OF GREATER
NEW YORK, LOCAL 802, AMERICAN
FEDERATION OF MUSICIANS, AFL--CIO
(Bob Chevy Orchestras)

and

NATIONAL ASSOCIATION OF ORCHESTRA
LEADERS

ASSOCIATED MUSICIANS OF GREATER
NEW YORK, LOCAL 802, AMERICAN
FEDERATION OF MUSICIANS, AFL--CIO
(Vogue Restaurant, Inc.)

and

NATIONAL ASSOCIATION OF ORCHESTRA
LEADERS

FILE IN
FORMAL FILE
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Case 29--CE--25

Case 29--CC--433

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DECISION AND ORDER

On January 7, 1976, Administrative Law Judge Robert M. Schwarzbart issued the attached Decision in this proceeding. Thereafter, Respondent and Charging Party filed exceptions and supporting briefs.

225 NLRB No. 74

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,^{1/} and conclusions of the Administrative Law Judge and to adopt his recommended Order^{2/} as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order

1/ The Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. Standard Dry Wall Products, Inc., 91 NLRB 544 (1950), enfd. 188 F.2d 362 (C.A. 3, 1951). We have carefully examined the record and find no basis for reversing his findings.

In finding that Respondent violated Sec. 8(b)(4)(ii)(B) by its threat to picket the mall, we do so wholly on the basis that such threat, by its breadth, contemplated picketing of the entire shopping center and any employer, person, or individual working or employed there without regard to their connection with the primary here. United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Local No. 639 (American Modulars Corporation), 203 NLRB 1112, fn. 1 (1973). Accordingly, we find it unnecessary to consider the Administrative Law Judge's discussion of the Supreme Court's decision in N.L.R.B. v. Fruit and Vegetable Packers and Warehousemen, Local 760, and Joint Council No. 28, of IBT (Tree Fruits Labor Relations Committee, Inc.), 377 U.S. 58 (1964), commonly referred to as the Tree Fruits decision.

2/ In view of our finding of similar violations in other recent cases, Associated Musicians of Greater New York, Local 802, AFM, AFL-CIO (Random Travel, Inc.), 171 NLRB 1106 (1968); Associated Musicians of Greater New York, Local 802 (National Association of Orchestra Leaders), 176 NLRB 198 (1969); Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO (Huntington Town House, Inc.), 203 NLRB 1078 (1973), demonstrating Respondent's proclivity to violate the Act in the same and similar respects as found herein, we shall broaden the Order herein.

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of the Administrative Law Judge as modified below and hereby orders that the Respondent, Associated Musicians of Greater New York, Local 802, American Federation of Musicians, AFL-CIO, New York, New York, its officers, agents, and representatives, shall take the action set forth in the Administrative Law Judge's recommended Order, as so modified.

Substitute the following for paragraph 2(a) of the Administrative Law Judge's recommended Order:

"(a) Post at its office, place of business, and meeting places, copies of the attached notice marked "Appendix."^{83/} Copies of said notice, on forms provided by the Regional Director of Region 29, shall, after being duly signed by Respondent's representative, be published in six consecutive issues of "Allegro" on the final page of that official publication, which page shall not be encumbered by any other written material. In addition, the duly signed notice shall be mailed to all catering establishments with which members of Respondent have had engagements within the last 12 months for posting, should they be willing; and the duly signed notice shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by it for 60 consecutive days in all places where notices to its members are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material."

Dated, Washington, D.C. JUN 30 1976

Betty Southard Murphy, Chairman

Howard Jenkins, Jr., Member

Peter D. Walther, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

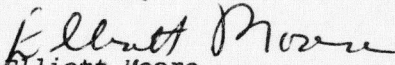
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 77-4021
	)	
ASSOCIATED MUSICIANS OF GREATER	)	
NEW YORK, LOCAL 802, AMERICAN	)	
FEDERATION OF MUSICIANS, AFL-CIO,	)	
	)	
Respondent.	)	

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the appendix in the above-captioned case have this day been served by first class mail upon the following counsel at the addresses listed below:

Levin & Weissman
Att: Jeffrey Krisberg, Esq.
122 East 42nd Street
New York, New York 10017

Godfrey P. Schmidt, Esq.
654 Madison Avenue
New York, New York 10022



Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D.C.

this 30th day of March, 1977.